APPENDIX A

United States Court of Appeals,
Fifth Circuit.

No. 74-2881.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Antonio QUESADA, Alfredo Flores,
a/k/a Ali and Maritza Brezot,
Defendants-Appellants.

May 7, 1975.

Defendants were convicted in the United States District Court for the Southern District of Florida, James Lawrence King, J., of conspiracy to receive, conceal, buy and sell unlawfully imported heroin, and they appealed. The Court of Appeals, Clark, Circuit Judge, held that defendant's allegation that he was kidnapped by government agents and brought into the United States did not defeat the district court's personal jurisdiction; that the evidence was sufficient to support the conviction; that the separate indictments of two coconspirators did not render said coconspirators unavailable to defendant as witnesses and did not bar use of their statements against defendant; and that defendants were not so prejudiced by the conduct of the Government's attorney in talking to a prosecution witness that a mistrial should have been declared or the witness' testimony stricken.

Affirmed.

1. Criminal Law —99

In prosecution for conspiracy to receive, conceal, buy and sell unlawfully imported heroin, assertion that defendant was kidnapped by government agents and brought into United States could not defeat personal jurisdiction of district court, notwithstanding contention that kidnapping would violate defendant's right to be free of unlawful searches and seizures and right to due process. U.S.C.A. Const. Amends. 4, 5.

2. Conspiracy —47(12)

Evidence, including testimony that defendant referred to substance distributed by him as "very best" heroin, was sufficient to sustain conviction of conspiracy to receive, conceal, buy and sell unlawfully imported heroin. Narcotic Drugs Import and Export Act, § 2(b-d, f), 42 Stat. 596 as amended.

3. Conspiracy —47(12)

In prosecution for conspiracy to receive, conceal, buy and sell unlawfully imported heroin, introduction of chemical analysis of substance is not essential to conviction and nature of substance as narcotic need not be proved by direct evidence if circumstantial evidence presented establishes that beyond reasonable doubt substance is heroin. Narcotic Drugs Import and Export Act, § 2(b-d, f), 42 Stat. 596 as amended.

4. Conspiracy —43(12)

In prosecution for conspiracy to receive, conceal, buy and sell unlawfully imported heroin, evidence of overt act

committed by two coconspirators who were named in separate indictment was admissible, even though said overt act was not alleged in indictment of defendant.

5. Criminal Law —508(4)

In prosecution of defendant for conspiracy to receive, conceal, buy and sell unlawfully imported heroin, fact that two coconspirators were indicted and tried separately did not demonstrate that they were unavailable to defendant as witnesses.

6. Criminal Law —422(1)

In prosecution of defendant for conspiracy to receive, conceal, buy and sell unlawfully imported heroin, statements of coconspirators were admissible against defendant even though they were indicted and tried separately.

7. Criminal Law —700

Where prosecutor at defendant's conspiracy trial admitted telling witness during recess that witness was doing good job and cautioned him not to fall into trap defense counsel was laying on cross-examination, fact that witness' recollection of conversation was somewhat different, in that he did not remember prosecutor cautioning him not to fall into trap, did not oblige prosecutor to correct "known false testimony" absent showing that prosecutor knew witness' statements were false.

Appeals from the United States District Court for the Southern District of Florida.

Before BROWN, Chief Judge, and GODBOLD and CLARK, Circuit Judges.

CLARK, Circuit Judge:

Maritza Brezot, Antonio Quesada and Alfredo Flores were convicted of conspiracy to receive, conceal, buy and sell unlawfully imported heroin in violation of 21 U.S.C. §§ 173 and 174. Flores argues that because he was illegally kidnapped into the United States by federal agents the court does not have jurisdiction over him. Quesada argues that the evidence was insufficient to convict and that statements of coconspirators were erroneously admitted against him. All three appellants urge that the prosecutor erred in discussing the case with a witness during a recess which occurred while the witness was on cross examination. Finding no merit in these contentions, we affirm.

Appellant Flores, a Venezuelan, argues that the trial court lacked personal jurisdiction over him because he was kidnapped into this country from his homeland by federal agents. He first raised this issue of no jurisdiction at his removal hearing in Puerto Rico. His motion to quash was denied and he was ordered removed to Miami. He did not renew the motion before the trial court but that court granted his motion to supplement the record on appeal by filing the transcript of the removal hearing and his affidavit and offer to prove the kidnapping.

[1] In this court Flores contends that his forcible abduction by government agents violates the federal Kid-

napping Act, the treaty between the United States and Venezuela, and the Charter of the United Nations, thereby depriving him of due process and Fourth Amendment guarantees. In United States v. Winter, 509 F.2d 975 (5th Cir. 1975) and United States v. Herrera, 504 F.2d 859 (5th Cir. 1974), we considered contentions similar to those now being asserted by Flores, and held that under present Supreme Court decisions, as well as decisions of this court, these arguments lack merit. Frisbie v. Collins, 342 U.S. 519, 522, 72 S.Ct. 509, 96 L.Ed. 541 (1952); Ker v. Illinois, 119 U.S. 436, 444, 7 S.Ct. 225, 30 L.Ed. 421 (1886); United States ex rel. Lujan v. Gengler, 510 F.2d 62 (2nd Cir. 1975); United States v. Toscanino, 500 F.2d 267, reh. denied (2nd Cir. 1974); United States v. Caramian, 468 F.2d 1370, 1371 (5th Cir. 1972); United States v. Vicars, 467 F.2d 452, 455 (5th Cir. 1972).

[2] Appellant Quesada alleges there was insufficient evidence that the substance he was involved with and sold was in fact heroin or that he knew it to be such. The evidence shows, however, that during the course of two separate transactions in which Quesada was intimately involved the substance was continuously referred to as the "very best" heroin in his presence and described by him as heroin in his conversations with others. It was a white powder, on both occasions it was sold to him for 20,000 dollars per kilo (one thousand grams) and he resold it after the buyers tested it and pronounced it to be heroin for 22,000 dollars per kilo. The product never came into the possession of the government, so a specific assay was impossible.

[3] The introduction of a chemical analysis of the substance is not essential to conviction. United States v.

Graham, 464 F.2d 1073 (5th Cir. 1972). The nature of the substance as a narcotic need not be proved by direct evidence if the circumstantial evidence presented establishes, as it did here, that beyond a reasonable doubt the substance was heroin. E.g. United States v. Gregorio, 497 F.2d 1253, 1263 (4th Cir. 1974); United States v. Jones, 480 F.2d 954, 960 n. 4 (5th Cir. 1973), cert. denied, Stockmar v. United States, 414 U.S. 1071, 94 S.Ct. 582, 38 L.Ed.2d 476 (1974); United States v. Atkins, 473 F.2d 308, 314 (8th Cir. 1973), cert. denied, 412 U.S. 931, 93 S.Ct. 2751, 37 L.Ed.2d 160 (1974); United States v. Fantuzzi, 463 F.2d 683, 689 n. 7 (2nd Cir. 1972); United States v. Agueci, 310 F.2d 817, 828 (2nd Cir. 1962), cert. denied, 372 U.S. 959, 83 S.Ct. 1016, 10 L.Ed.2d 12 (1963); Toliver v. United States, 224 F.2d 742, 745 (9th Cir. 1955). The evidence also disclosed that Quesada helped others weigh and package the substance and thus had possession of the drug. In Turner v. United States, 396 U.S. 398, 90 S.Ct. 642, 24 L.Ed.2d 610, reh. denied, 397 U.S. 958, 90 S.Ct. 939, 25 L.Ed.2d 144 (1970), the Court held the government is entitled to an instruction that the jury may infer heroin which is within the United States was smuggled into the country and one who possesses heroin within the United States is charged with the knowledge that the drug was unlawfully imported. In addition to proof of constructive knowledge through possession, the government introduced testimony revealing that Quesada in fact had actual knowledge of the unlawful importation, i.e., testimony that in Quesada's presence Flores stated that he had brought the heroin from Lebanon. The sufficiency of the evidence adduced against Quesada meets the test of Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1941).

Appellant Quesada further argues that the government split its conspiracy indictments, naming the three appellants in one and two other coconspirators, Jose Avalos and Rudolfo Castrillon, in a separate indictment, and then proceeded to introduce testimony in the trial of Quesada implicating him in an overt act not alleged in the conspiracy indictment under which he was tried. The declarations complained of were made among Avalos, Castrillon and Inchaustegui and were related by Inchaustegui at his trial.

[4, 5] Quesada contends that the separate indictments of Avalos and Castrillon both rendered them unavailable to him as witnesses and constituted the conspiracy charged against them a separate conspiracy from that charged against Quesada and his codefendants, and thus created a single-multiple conspiracy variance between the charge laid and the proof. These contentions are specious. The evidence established that Avalos and Castrillon made a buy or heroin from Inchaustegui and Quesada during the course of the conspiracy charged to Quesada. That this overt act was the basis for a separate indictment against Avalos and Castrillon does not establish that the sale was not a part of a single heroin marketing conspiracy by Quesada and his codefendants. The proof shows it was. Nor does the fact that this sale was not alleged as an overt act in the indictment against the latter preclude proof of it at their trial. "We have held before that the government is not limited to overt acts pleaded in proving a conspiracy. It may show other acts of the conspirators occurring during the life of the conspiracy." United States v. Perez, 489 F.2d 51, 70 (5th Cir.), reh. denied, 488 F.2d 552 (5th Cir. 1973); accord, United States v. Ayres, 434 F.2d 60 (5th Cir. 1970), cert. denied, 401 U.S. 938, 91 S.Ct. 930, 28 L.Ed2d 217 (1971); Reese v. United States,

353 F.2d 732 (5th Cir. 1965); Finley v. United States, 271 F.2d 777 (5th Cir. 1959), cert. denied, 362 U.S. 979, 80 S.Ct. 1065, 4 L.Ed.2d 1014 (1960). Moreover, the mere fact that Avalos and Castrillon were separately indicted and separately tried does not demonstrate that they were unavailable to him as witnesses.

[6] The proof furthermore established that Avalos and Castrillon were more than mere purchasers, they were shown to be actively engaged as coconspirators in the same conspiracy even though they were not named in the same indictment. Thus, their statements were admissible against Quesada.

[7] Finally, all three appellants argue that they were so prejudiced by the conduct of the government's attorney in talking to a witness that a mistrial should have been declared or the witness' testimony stricken. At trial a named but unindicted coconspirator, Carlos Inchaustegui, and a convicted narcotics violator, Felix Olivera, testified against appellants. While Olivera was on cross examination there was a recess during which he talked with the trial attorney representing the United States. A defense counsel observed this intercourse and protested to the trial judge. Upon subsequent questioning from the court concerning the substance of their conversation, the attorney stated she told Olivera he was doing a good job, and not to fall into the trap the defense was trying to lay for him in regard to a previous misdemeanor conviction. Defense counsel asked for a mistrial or, in the alternative, that Olivera's testimony be stricken. The court chastised the attorney but denied further relief. When Olivera's cross examination resumed he testified that he did not remember any mention of a trap. Citing Giglio v. United States,

405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), and United States v. Johnson, 487 F.2d 1318 (5th Cir. 1974), defendants contest the government's alleged failure to correct known false testimony, i.e., Olivera's statement that he did not remember the part about the trap.

Giglio and Johnson are inapposite. In the case at bar, the prosecutor had stated her recollection of the conversation before Olivera resumed his testimony. The defense used the information gained from this statement in their cross examination. Olivera's testimony as to his recollection of the same conversation, while different, was not shown to have been false. The government urges United States v. Burke, 495 F.2d 1226 (5th Cir. 1974) is applicable. In that case, where the trial court allowed the prosecutor to work with a witness over the weekend on his upcoming cross-examination, we held that in the absence of a showing of prejudice the error was not reversible. In the circumstances of the case at bar the result is the same. Assuming arguendo that the actions of the trial attorney were erroneous, they were unknowingly so and did not affect any substantial rights of the defendants. Such an error would not dictate reversal, Fed. R.Crim.P. 52(a).

The convictions appealed from are
Affirmed.

APPENDIX B

THE U.S. CONSTITUTION

AMENDMENT IV [1791]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V [1791]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX C

UNITED NATIONS CONSTITUTIONAL DOCUMENTS

CHAPTER I. PURPOSES AND PRINCIPLES

Art. 2 §4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

CHAPTER IV.

ORGANIZATION OF AMERICAN STATES CONSTITUTIONAL DOCUMENTS

FUNDAMENTAL RIGHTS AND DUTIES OF STATES

Art. 17. Respect for and the faithful observance of treaties constitute standards for the development of peaceful relations among States. International treaties and agreements should be public.

Art. 20. The territory of a State is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly, on any grounds whatever. No territorial acquisitions or special advantages obtained either by force or by other means of coercion shall be recognized.